No. 87-998

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Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

—v.—

J. A. CROSON COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF VIRGINIA, AND THE ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLANT

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Northern California and the ACLU of Virginia are two of its statewide affiliates.

This case involves a constitutional challenge to a remedial program adopted by the City of Richmond to provide employment opportunities for minority-owned businesses. Because the ACLU believes such programs are not only permissible, but indispensable, if the nation is to fulfill the promise of equality contained in the Fourteenth Amendment, we submit this brief in support of petitioners and urge this Court to reverse the decision below.

SUMMARY OF ARGUMENT

This Court has yet to decide the proper constitutional analysis applicable to voluntary race-conscious affirmative action programs. In our view, such programs should be subject to intermediate scrutiny rather than the strict scrutiny applied in reviewing statutory schemes that reflect an invidious intent.

As this Court has repeatedly recognized, efforts to remedy past discrimination must often employ race-conscious criteria. E.g., Fullilove v. Klutznick, 448 U.S. 448, 482 (1980). "Any other approach would freeze the status quo that is the very target of all desegregation processes." McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

Applying strict scrutiny to locally-enacted affirmative action plans would turn

the Equal Protection Clause on its head, barring local governments from voluntarily and effectively responding to persistent racial disparities within their communities. It also produces the paradoxical result that affirmative action plans designed to assist those "discrete and insular minorities" who have suffered the greatest discrimination are most vulnerable to attack.

In addition, the decision below perverts basic notions of federalism. After Fullilove, the federal government may require localities to adopt a minority set-aside program as a condition of a federal grant. Yet, when the same locality adopts the same set-aside program without federal funding, it risks running afoul of the decision below.

Finally, the decision below misinterprets the holding of Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). Nothing in Wygant bars a locality from adopting a minority set-aside program in response to clear evidence that public construction contracts were not being awarded to minority businesses. Indeed, Wygant approvingly cites the federal set-aside program upheld in Fullilove, which served as a model for Richmond's plan in this case.

ARGUMENT

I. THE COURT SHOULD APPLY INTERMEDIATE SCRUTINY IN EVALUATING RICHMOND'S MINORITY SET-ASIDE PROGRAM

A majority of this Court has not yet agreed on the standard of review when affirmative action plans are challenged as racially discriminatory under the equal

protection clause. Several Justices have utilized the so-called intermediate standard applied to gender discrimination cases; i.e., the plan "must serve important governmental objectives and must be substantially related to achievement of those objectives."[1] Other Members of the Court have applied strict srutiny, requiring the government to show that its program is narrowly tailored to serve a compelling interest.[2]

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[1] Regents of the University of California v. Bakke, 438 U.S. 265, 359 (1977)(Brennan, White, Marshall, and Blackmun, JJ.); Fullilove v. Klutznick, 448 U.S. at 519 (Brennan, Marshall, and Blackmun, JJ.).

[2] Bakke, 438 U.S. at 306 (Powell, J.); Fullilove, 448 U.S. at 496 (Powell, J.); Wygant, 476 U.S. at 273 (Powell, Burger, Rehnquist, and O'Connor, JJ.) Even the definition of strict scrutiny as applied to affirmative action has defied clear standards. In Bakke, Justice Powell referred to the need for a "substantial"

(continued...)

We recognize, of course, that these distinctions are fine ones. Nevertheless, they have important substantive consequences in constitutional adjudication. They also have symbolic importance. Simply put, efforts to assist traditionally disadvantaged and historically oppressed minorities should not be treated with the same judicial skepticism as efforts to perpetuate the stigma of inferiority that the Civil War amendments were designed to eliminate.

A. Applying Strict Scrutiny In This Case Would Turn The Equal Protection Clause On Its Head

The "pervading purpose" of the Fourteenth Amendment was to eliminate the oppression of historically subjugated

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[2](...continued)
interest. 438 U.S. at 306. In Wygant, he would have required a "compelling" governmental interest. 476 U.S. at 273.

minorities and to provide them with "equality of economic opportunity." Fullilove, 448 U.S. at 489. See also The Slaughterhouse Cases, 83 U.S. (16 Wall) 36, 69 (1872). A properly drawn affirmative action plan is not inconsistent with these purposes. To the contrary, it promotes them.

This relationship was well understood by the Thirty-Ninth Congress, which proposed the Fourteenth Amendment. At the same time, it also enacted a series of measures to aid the newly freed slaves, including creation of the Freedman's Bureau, special assistance for black servicemen, and special relief to blacks in the District of Columbia.[3] Then, as now,

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[3] See generally Schnapper, "Affirmative Action and the Legislative History of the Fourteenth Amendment," 71 Va.L.Rev. 753 (1985).

those programs were challenged as preferential to blacks.[4] One of the purposes of the Fourteenth Amendment, however, was to answer those objections.[5]

The argument that affirmative action and invidious discrimination must be treated equivalently under the Fourteenth Amendment is historically insupportable. It is also logically perverse. As this Court observed in rejecting the claim that voluntary affirmative action plans were barred by Title VII:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of

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4 Id. at 763.

5 See J. TenBroek, Equality Under Law 201 (1965).

> all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Steelworkers v. Weber, 443 U.S. 193, 204 (1979)(citation omitted).

Using the strict scrutiny standard of the equal protection clause to review affirmative action plans represents an even greater irony, whose consequences are both far-reaching and not amenable to legislative response.

B. Applying Strict Scrutiny In This Case Would Subvert The Rationale of the Suspect Classification Doctrine

There is no "fundamental right" to contract with the City of Richmond, on public construction projects or otherwise. Thus, the only possible rationale for applying strict scrutiny to Richmond's set-aside program is that it is based on the "suspect" classification of race.

The statement that all racial clasifications are constitutionally "suspect" is akin to the statement that the Constitution is "color-blind." Both are useful aphorisms but neither, in fact, accurately reflects the inescapable complexity of consitutional principle. This Court has specifically rejected the notion, on several occasions, that remedial programs must be "color-blind." E.g., Fullilove, 448 U.S. at 482; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).[6] Likewise, racial

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[6] The reference to a "color-blind" Constitution derives, of course, from Justice Harlan's famous dissent in Plessy v. Ferguson, 163 U.S. 537 (1896). Read in context, however, it is clear that Justice Harlan's objection to racial classifications was based on his view that the Constitution forbid legislation that assumed that "colored citizens are . . . inferior," and that imposed upon them "a badge of servitude." Id. at 560, 562. Affirmative action plans, like Richmond's, (continued...)

classifications are more or less "suspect" depending on the purpose for which they are developed and the characteristics of the disadvantaged group.

The designation of certain "discrete and insular" minorities as "suspect" classes is conceptually linked to this Court's perception that such minorities operate at a disadvantage within the political system for a host of reasons that have nothing to do with their innate abilities. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

Those concerns do not apply when, as here, a law is challenged by members of the political majority who have not been "subjected to such a history of purposeful

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[6](...continued)
proceed on very different assumptions and have very different goals.

unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973). See also Hernandez v. Texas, 347 U.S. 475 (1954).[7]

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[7] The fact that racial minorities may constitute 50% of the general population in some cities, as they do in Richmond, does not automotically render whites a "discrete and insular minority" invoking suspect classification analysis. Mere numerical majority does not translate automatically into political domination. See Castaneda v. Partida, 430 U.S. 482, 530 (1977); United Jewish Organizations v. Carey, 430 U.S. 144, 164 (1977). The political strength of an identifiable group depends, inter alia, on voting registration rates, political cohesiveness and organization, and, of course, economic resources. See generally, Buckley v. Valeo, 424 U.S. 1 (1976)(per curiam). Moreover, the fact that a local minority constitutes a dominant group in the larger society is relevant: their political vulnerability is mitigated by the potential availability of remediation and protection at the state or

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"Discrete and insular"-minorities also struggle with a unique badge of inferiority imposed on them by history. Recognizing that fact, this Court upheld racial segregation in the public schools not for the sake of "color-blindness" itself, but because segregation generated

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[7](...continued)
federal level.

The decision below utilized the population statistics in Richmond to suggest that the set-aside program might not be remedial at all but merely the "bald dispensation[] of public funds and employment based on the politics of race." 822 F.2d at 1358. That concern is unsupported by the record, which shows that minority businesses had received less than 1% of the dollar value of all public contracts awarded in Richmond. Moreover, intermediate scrutiny is adequate to protect against the sort of racial politics feared by the Fourth Circuit. As framed by Justice Brennan in Bakke, it requires a "sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities." 438 U.S. at 362.

among blacks "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . ." Brown v. Board of Education, 347 U.S. 483, 495 (1954). Likewise, the anti-miscengenation laws were struck down because they represented "an obvious endorsement of white supremacy." Loving v. Virginia, 388 U.S. 1, 11 (1967)(footnote omitted).

Laws that perpetuate a sense of racial inferiority are neither the legal nor moral equivalent of laws designed to relieve it. There is no reason, therefore, for this Court to subject them to the same level of review under the equal protection clause.

It would be disingenous to pretend that affirmative action plans have not been controversial. But it is fair to say that such plans do not, by and large, "reflect

prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others." Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Surely, that difference has constitutional significance that this Court should acknowledge in applying the equal protection clause. Cf. Washington v. Davis, 426 U.S. 229 (1975).[8]

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[8] As Justice Stevens noted in Wygant, 476 U.S. at 316:

> There is . . . a critical difference between a decision to exclude a member of a minority race because of his or her skin color and a decision to include more members of the minority in a school faculty for that reason.
>
> The exclusionary decision rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society . . . . The inclusionary decision is consistent with the

(continued...)

C. Applying Strict Scrutiny In This Case Creates An Illogical Paradox Under Equal Protection Law

The automatic assumption that all racial classifications must be judged by one standard under the equal protection clause -- whether their purpose is benign or invidious -- creates an intolerable paradox. Because of the rigors of strict judicial scrutiny, government is least able to help those groups that have historically suffered the greatest discrimination. By contrast, groups that are not deemed "suspect" for constitutional purposes, are more likely to receive the government's aid.

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[8](...continued)
principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not.

This paradox was realized in Associated General Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing and suggestion of rehearing en banc pending). The Ninth Circuit in that case upheld a portion of San Francisco's ordinance setting aside a percentage of city contracts to women-owned businesses but struck down a similar provision relating to minority-owned businesses. The perverse outcome resulted from the court's application of the intermediate scrutiny to the Women Business Enterprise provision, and strict scrutiny to the Minority Business Enterprise provision. It is hard to conceive how this result could possibly further the historical purposes of the Fourteenth Amendment.

II. THE DECISION BELOW MISINTERPRETS THIS COURT'S HOLDING IN WYGANT

The affirmative action plan in Wygant was struck down by this Court on three principal grounds. First, it involved layoffs rather than hiring or promotion. Second, it was not conceived as a remedy for past discrimination against non-white teachers; instead, it was justified by reference to society's generally discriminatory attitude toward non-whites and the corresponding need to provide non-white students with role models. Third, it was developed by the school board itself and not by a legislative body with plenary power.

None of these objections applies to the Richmond plan at issue in this case. To the contrary, that plan is essentially indistiguishable from the federal set-aside program upheld in Fullilove.

A. The Special Burden Of A Layoff Plan

This Court has consistently treated preferential layoff schemes differently than other affirmative action programs. See e.g., Firefighters v. Stotts, 467 U.S. 561 (1984). The reason for that difference was explained in Wygant: "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." 476 U.S. at 283 (footnote omitted).

By contrast, a minority set-aside program does not violate any vested rights, nor disrupt any "settled expectations," nor is it likely to produce the psychological dislocation associated with "[e]ven a

temporary layoff." Id.[9] Under the Richmond plan, for example, the 30% set aside applies only to subcontract dollars; white contractors are not excluded from any portion of the city's primary contracts. They are eligible, as well, for a substantial majority (70%) of the subcontract dollars. Cf. U.S. v. Paradise, 480 U.S. ___, 107 S.Ct. 1053 (1987)(approving court ordered one-to-one ratio in promotions); Steelworkers v. Weber, 443 U.S. 193 (1979)(approving 50% hiring ratio). And they can participate in the 30% set-aside through joint ventures or 49% ownership of minority business enterprises. See South Florida Chapter v.

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[9] For the same reasons, the need for strict scrutiny is significantly less in this case than it might have been in Wygant. See Point I, supra.

Metropolitan Dade County, 723 F.2d 846, 856, n.15 (11th Cir. 1984).

Moreover, the plan does not affect the ability of white contractors to compete for private contracts and other public contracts. Cf. Fullilove, 448 U.S. at 514-515 (Powell, J.)(10% federal set-aside constituted only .25% of all funds expended yearly on construction work in the United States). It has a relatively brief duration of only five years, contains waiver provisions which parallel those approved in Fullilove, and sets a percentage level "roughly halfway between the present percentage of minority contractors and percentage of minority group members." Fullilove, 448 U.S. at 513-514 (Powell, J.).

Obviously, there is a burden attached to any affirmative action plan in the sense

that it involves a redistribution of resources. Yet here, as in Fullilove, the "actual burden shouldered by nonminority firms is relatively light." Id. at 484 (footnote omitted). If that burden is now deemed too great for the Constitution to bear, then affirmative action plans throughout the country are in jeopardy. Nothing in Wygant compels that result.

B. Wygant's Reference to Societal Discrimination Does Not Apply To The Facts Of This Case

This Court's statement in Wygant that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," 476 U.S. at 276 (emphasis added), must be understood in context. It appears in the midst of a discussion by the Court of the "role model" theory offered by the school board as the basis for its layoff plan.

The Court perceived two problems with the school board's approach in Wygant. It had "no logical stopping point . . . [and] allow[ed] the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose." Id. at 275. In addition, it might actually frustrate efforts to remedy prior discrimination "by justifying the small percentage of black teachers by reference to the small percentage of black students." Id. at 276.

The reference to "societal discrimination" became a shorthand way of expressing the notion that the rationale for the layoff plan had only a tangential relationship to the population of teachers most affected by its implementation. In classic constitutional terms, there was an inadequate fit between means and ends. To

remedy one problem -- the absence of role models -- the school board created another problem -- the loss of seniority benefits. It was this incongruity that the Court was unwilling to accept.

The Richmond set-aside plan is entirely different in both its scope and motivation. Unlike Wygant, it does not require year-by-year calibration. Id. at 275. More importantly, it does not suffer the lack of focus that so disturbed the Court in Wygant. Based on the evidence before it, the Richmond City Council was understandably concerned that minority businesses had never been given a fair opportunity to compete for construction contracts. In response, they adopted a plan designed to remedy this specific denial of equal economic opportunity. See Fullilove, 448 U.S. at 489. In short, the

nexus that was absent in Wygant -- and that prompted the Court's comment about societal discrimination -- is fully present here.[10]

Moreover, the concerns of the City Council are amply supported by the record. Contrary to the assertion of the majority below, the City Council did not "rest on broad-brush assumptions of historical discrimination." 822 F.2d at 1357. Instead, it relied upon uncontroverted evidence that the city had awarded, and was continuing to award, an infinitesimal percentage of its construction contracts to minority businesses. Furthermore, the City Council reasonably concluded that past discrimination within the construction

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10 As in Fullilove, the 30% set-aside figure adopted by the Richmond City Council is "roughly halfway between the present percentage of minority contractors and percentage of minority group members. 448 U.S. at 513-14 (Powell, J.).

industry explained the virtual absence of minority businesses from Richmond's contract award recipients.[11]

The record thus establishes a nexus between current underrepresentation of minority owned businesses in the award by Richmond of its public contracts and identifiable racial discrimination in the construction industry. No such nexus was established between the percentage of minority teachers and students in Wygant.

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11 All three branches of the federal government have recognized the history of pervasive and universal discrimination in the construction industry. See e.g., Executive Orders Nos. 11246, 11458, 11518 and 11625; Fullilove, 448 U.S. at 456-472; Steelworkers v. Weber, 443 U.S. at 198 n.1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). Nothing in the record or common sense suggests that the City of Richmond, Virginia was immune from the nationwide phenomenon of race discrimination in the construction industry.

As this Court noted, that disparity is one for which "there are numerous explanations . . . many of them completely unrelated to discrimination of any kind." 476 U.S. at 276.

Summarizing the evidence developed by the City Council at its legislative hearing on the set-aside plan, the district court wrote:

> It was established at the hearing that there were enormous disparities between the percentage of construction contracts awarded to minority businesses (0.67%) and the percentage of minorities in the Richmond population (about 50%) over a five-year period from 1978 to 1983 . . . . It was further stated by a city councilman and by the city manager that there was discrimination and exclusion on the basis of race kin the construction industry. in both Richmond and the state. There were a number of representatives of contracting associations present at the hearing, none of which denied this claim -- although some of them asserted that their own organizations did not dis-

criminate on the basis of race.[12]

Significantly, the 0.67% figure for minority contracts in Richmond corresponds almost precisely with the evidence considered in Fullilove, which indicated that less than 1% of all federal procurement contracts were going to minority businesses. 448 U.S. at 459.[13]

The Fourth Circuit dismissed these findings as legally insufficient after Wygant on the spurious ground that the Richmond City Council had based its set-aside plan on "national findings," 822 F.2d at 1359-60, which were analogous to

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12 The district court's findings are set forth in Appellant's Supplemental Appendix to the Jurisdictional Statement, at 164-65 (hereinafter District Court Findings).

13 These percentages are measured in terms of the dollar amount of the contracts.

the evidence of societal discrimination rejected in Wygant as a basis for affirmative action.

In fact, the Richmond City Council did not rely only on national findings. Rather, the Council was prompted to act by a congruence between the evidence elicited at is own hearing and the congressional tesimony cited in Fullilove.[14] Moreover, the so-called "national" findings disparaged by the Fourth Circuit had direct bearing on the situation in Richmond. As Chief Justice Burger noted in Fullilove:

> [T]he House Subcommittee on SBA Oversight and Minority Enterprise . . . took "full notice" . . . of reports submitted to the Congress by the General Accounting Office and by the U.S. Commission on Civil Rights . . . The Civil Rights Commission report discussed at some length the barriers encountered by minority

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14 See District Court Findings at 165.

> businesses in gaining access to government contracting opportunities at the federal, state, and local levels.

448 U.S. at 465-67 (emphasis added). Although much of this evidence related to federal procurement, there was also "direct evidence before the Congress that this pattern of disadvantange and discrimination existed with respect to state and local construction contracting as well." Id. at 478.

In the same report, the Commission on Civil Rights found that

> State and local governments . . . spend proportionately more than the Federal Government for construction. Since a large percentage of minority firms are retail and small construction companies . . . both the volume and nature of State and local contracting should provide extensive contracting opportunities for minority [business enterprises] . . . . The Federal Government has attempted . . . to stimulate the participation of minorities in

> State and local contracting. Federal efforts, however, have not resulted in a significant increase in State and local contracting programs and awards for minorities and women.[15]

Given its finding that women and minorities were significantly underrepresented in state and local contracting, the Civil Rights Commission recommended, inter alia, that "[s]tate and local governments . . . establish special contracting programs to increase contract awards to minority and female-owned firms," and suggested that "mayors should review existing procurement laws of their jurisdictions and determine the extent to

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15 United States Commission on Civil Rights, Minorities and Women as Government Contractors 122 (May 1975).

which these laws permit the establishment of contract set-aside programs."[16]

That is exactly what the Richmond City Council did in this case. Relying on Fullilove, it adopted a remedial plan that addresses a documented problem of discrimination within its local community. As the district court found: "[T]he evidence before the City Council when it enacted the ordinance . . . confirms the Plan's remedial goals."[17] Moreover, the

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16 Id. at 139.

17 See District Court Findings at 164. This conclusion is confirmed by the testimony of the Richmond City Attorney who testified before the City Council in support of the set-aside plan:

> [T]he Supreme Court, when it approved the ten per cent minority set-aside, specifically said that the justification was that it was remedial. We've reviewed the statistics of the construction contracts, and it certainly justifies that . . . [Y]es, it is

(continued...)

plan's "remedial goals" and the evidence of past discrimination before the Richmond City Council, easily distinguish this case from Wygant.

C. Wygant's Reference To Past Discrimination By the Governmental Unit Adopting An Affirmative Action Plan Should Not Be Applied Outside The Layoff Context

The Fourth Circuit erred in striking down the Richmond set-aside plan on the ground that voluntary, race conscious, affirmative action programs initiated by a state or local legislature must be predicated on a showing of "prior discrimination by the governmental unit involved." 822 F.2d at 1358, quoting Wygant, 476 U.S. at 274 (plurality

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[17](...continued)
remedial . . . .

Hearing on Adoption of Minority Business Utilization Plan, Richmond, Virginia City Council 8 (April 11, 1983)(transcript).

opinion)(emphasis supplied in Croson).

First, there is at least as much evidence of governmental discrimination in this case as in Fullilove. Second, the cited passage from Wygant did not command a majority of the Court.[18] Third, even the plurality opinion in Wygant does not place any such limit on the remedial power of state and local legislatures, as opposed to administrative bodies lacking plenary lawmaking authority.[19]

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[18] Under intermediate scrutiny, a finding of prior discrimination is not required. Bakke, 438 U.S. at 369 (Brennan, J.); Califano v. Webster, 430 U.S. 313, 317 (1977).

[19] The Richmond City Council is authorized under Virginia law to enact the city's Business Minority Utilization Plan, and has specific institutional competence to establish policies responsive to the effects of discrimination. 779 F.2d at 184-186. Unlike the Board of Education in Wygant or the Board of Regents in Bakke whose, "broad mission is education, not the

(continued...)

Contrary to the approach of the court below, Wygant need not and should not be read as establishing an absolute rule that state and local governments cannot engage in affirmative action in their award of public contracts absent evidence of their own prior discrimination. Such a result would be inconsistent with Fullilove,

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19(...continued)
formulation of any legislative policy or adjudication of particular claims of illegality" (Bakke, 438 U.S. at 309), the Richmond City Council is not an "isolated segment" within a vast governmental structure, but the plenary law-making body of the local sovereignty with the "authority and capability to establish . . . that the classification is responsive to identified discrimination." Bakke, 438 U.S. at 309 (Powell, J,). Its authority to set broad social policy and to fashion local legislation in response to the local impact of discrimination is essentially the same as Congress' role in the federal government. See Ohio Contractors v. Keip, 713 F.2d 167, 172 (6th Cir. 1983). Cf. Fullilove, 448 U.S. at 503 n.4 (Powell, J., concurring)("a court should uphold a reasonable congressional finding of discrimination")(emphasis added).

which invalidated federal set-aside legislation without any showing that the meager participation of minority-owned businesses in federally funded public contracts was the result of prior unlawful discrimination by the federal government or any other governmental unit. Congress merely found the disparity was the result of

> barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, <u>even absent any intentional discrimination or other unlawful conduct</u>.

448 U.S. at 478 (emphasis added).

It is clear from the legislative history that the congressional decision to adopt a federal set-aside program was prompted as much by concern over discriminatory practices in the private sector as any record of past governmental discrimination. The 1977 Report of the

House Committee on Small Business, cited by the Court in Fullilove, summarized the problem Congress was addressing:

> The very basic problem disclosed by the testimony is that - over the years - there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities.

448 U.S. at 466 n.48 (citation omitted).[20]

Nothing in Fullilove even remotely suggests that its holding is limited to

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[20] The result in Fullilove is justified not only by the Fourteenth Amendment's "century-old promise of equality with opportunity," 448 U.S. at 463, but also the fact that Civil War Amendments were intended to remediate both state and private discrimination. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 (1968).

congressional action. Nor would any such limitation make sense. If Congress has the power to respond to documented discrimination in a particular industry -- and to require the states to respond as a condition of receiving federal money -- then state and local legislatures must have the same power to respond to local problems without federal prodding.

To hold otherwise would totally distort the principles of federalism. As Justice Brennan observed in Bakke:

> [W]e see no reason to conclude that the States cannot voluntarily accomplish under Section 1 of the Fourteenth Amendment what Congress under Section 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the

> subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment.

438 U.S. at 368.[21]

Such a limitation upon the power of state and local legislatures to act in response to discrimination not of its own making would be unprecedented. This Court

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21 Nor can Fullilove be distinguished on the basis of Congress' enforcement power under Section 5 of the Fourteenth Amendment. The plurality opinion relied on Section 5 as authority only for the federal government's imposition of affirmative action on state and local governmental grantees, not for its substantive power to affect private rights. Fullilove, 448 U.S. at 476-78. See Ohio Contractors Association v. Keip, 713 F.2d 167, 172 (6th Cir. 1983).

has never doubted the power of state and local government to implement race-conscious integration of public schools in the absence of proven governmental discrimination. McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Swann v. Charlotte-Mecklenberg, 401 U.S. 1, 16 (1971).

State and local governments unquestionably have had the power to correct racial imbalances resulting from de facto segregation, even where the federal courts could not have constitutionally ordered a race-conscious remedy under Dayton Board of Education v. Brinkman, 433 U.S. 406, 420 (1976). See Kromnick v. School District of Philadelphia, 739 F.2d 894, 897 (3rd Cir. 1984); Jackson v. Pasadena City School District, 59 Cal.2d 876, 881, 382 P.2d 878 (1963). Indeed, this Court has invalidated attempts to

limit such local power. Washington v. Seattle School District, 458 U.S. 457 (1982); North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971).

The power of state and local governments to engage in race-conscious remediation despite the lack of any evidence of direct governmental culpability has been upheld in other contexts as well. United Jewish Organizations v. Carey, 430 U.S. 144, 157 (1977); South Florida Chapter v. Metropolitan Dade County, 723 F.2d 846, 853 (11th Cir. 1984).

Restricting a local government to the narrow remedial purpose of redressing only its unlawful discrimination would drastically and unnecessarily limit governmental efforts to "effectuate the constitutional mandate for equality of economic opportunity." Fullilove, 448 U.S.

at 489. Moreover, "[a] requirement that an employer actually prove that it had discriminated in the past would . . . unduly discourage voluntary efforts to remedy discrimination." Johnson v. Santa Clara Transportation Agency, ___ U.S. ___, 107 S.Ct. 1442, 1463 (1987)(O'Connor, J., concurring).[22]

Under the panel's interpretation of Wygant, local legislatures would be powerless to remedy the lingering effects of pervasive, identifiable, and even proven race discrimination in the private sector absent substantial evidence that the

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22 See also Sullivan, Supreme Court Forward: "Sins of Discrimination - Last Term's Affirmative Action Cases," 100 Harv.L.Rev. 78, 92 (1987)("even without formal findings . . . the task of self-judgment and self-condemnation in any form casts a chill over efforts to implement affirmative action voluntarily")(emphasis in original).

governmental unit involved itself discriminated. Indeed, local legislatures would be powerless to act even where it is clear that race-neutral remedies alone would not be effective.[23]

Imposing such a constitutional straitjacket on state and local legislatures would have the ultimate effect of perpetuating historical patterns of discrimination. Under the panel's ruling in this case, the government could not engage in affirmative action, even under the more generous "arguable violation" standard, unless it first established a

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23 Cf. Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C., 478 U.S. ___, 106 S.Ct. 3019, 3051 (1986)(affirmative action may be necessary to dissipate the lingering effects of pervasive discrimination, such as where union's reputation for discrimination operated to discourage minorities from even applying for membership).

statistical disparity between the percentage of minorities selected and percentage of minorities in the relevant pool. See Johnson, 107 S.Ct. at 1462-65, (O'Connor, J., concurring); Wygant, 476 U.S. at 292 (O'Connor, J., concurring). Where minorities have been excluded from the relevant pool as a result of prior discrimination, tying the permissible units of affirmative action to the composition of the pool would lock the locality into perpetuating the existing disparity:

> a proof scheme requiring a comparison of the percentage of contracts awarded with this small qualified pool of minority contractors would ensure the continuation of a systemic fait accompli, perpetuating a qualified minority contractor pool that approximates two-third of one percent of the overall contractor pool . . . . Common sense dictates that judging the set-aside by referring to the small proportion of existing MBE's in the economy would

> perpetuate rather than alleviate past discrimination.

822 F.2d at 1365, 1367 (Sprouse, J., dissenting).

Moreover, such a requirement creates a "gross anomaly" that the greater the effectiveness of historical non-governmental discrimination in excluding minorities from the relevant pool, the less room local legislatures have to act: "truly pernicious discrimination could have the compound effect of blocking remedial action." Id. at 1365 n.11 (Sprouse, J., dissenting). Certainly, such a perverse result is not countenanced by the equal protection clause, and Wygant should not be read as dictating such a result.

The panel majority below justified its interpretation of Wygant by reasoning that absent a particularized showing of past governmental discrimination, the

government's motive for establishing an affirmative action program is necessarily suspect. 822 F.2d at 1358. It is simply irrational to presume, as did the panel below, that an affirmative action program not predicated on a particularized showing of past governmental discrimination represents "an abuse of the political process rather than remedial action." 779 F.2d at 203 (Wilkinson, J., dissenting).

An affirmative action program may be implemented for a variety of legitimate reasons, such as eliminating a "work force imbalances in traditionally segregated job categories." Johnson, 107 S.Ct. 1442, 1455 (O'Connor, J., concurring). Moreover, a program may be established for legitimate "forward-looking considerations". See id. at 1460 (Stevens, J., concurring).

In addition to the goal of redressing the effects of identifiable discrimination in the construction industry, representative bodies such as the Richmond City Council have a particularly compelling interest in taking affirmative steps to avoid perpetuating racial disparities in the conduct of its business. The net effect of awarding public contracts to the near total exclusion of minority-owned businesses is to redistribute public moneys from economically disadvantaged blacks (who pay taxes like everyone else) to historically advantaged whites. This exacerbation of the malapportionment of economic resources perpetuates the fact and perception of unfairness and destroys community trust in the government. Williams v. Virkovich, 720 F.2d 909, 923-

924 (6th Cir. 1983). The "'exclusion of minorities from effective participation . . . . creates mistrust, alienation, and all too often hostility toward the entire process of government.'" Wygant, 476 U.S. at 290 (O'Connor, J., concurring), quoting S. Rep. No. 415, 92d Cong., 1st Sess. 10 (1971).

Richmond also had a substantial interest in removing barriers to competition in the construction industry caused by the prior exclusion of minorities therefrom. By taking immediate steps to facilitate the competiteveness and experience of minority businesses under the Minority Business Utilization Plan, the City will, in the long run, enhance the overall competitiveness of the construction industry and hence the efficiency of its bidding process. See 779 F.2d at 185.

Moreover, like Congress' set-aside legislation, the effect of the Plan was to "direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus." Fullilove, 448 U.S. at 459.

The severe limitation placed on permissible affirmative action by the panel --restricting race-specific set-asides to remedying Richmond's own prior discrimination -- is supported by neither logic,[24] policy, nor previous decisions of

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[24] From the perspective of non-minority contractors who bear the burden of the set-aside, it matters little whether the governmental unit involved engaged in past discrimination. Their burden is the same. See Bakke, 438 U.S. at 365 (Brennan, J.). Cf. Franks v. Bowman Transportation, 474 U.S. 747 (1976).

Where current disparities are attributable to past identifiable discrimination, be it private or public discrimination, non-minority businesses "may have reaped competitive benefit over the years from the

(continued...)

this Court. See Bakke, 438 U.S. at (medical school affirmative action admissions policy justified by diversity of student body); Paradise, 107 S.Ct. at 1065 n.18 (affirmative action in hiring of law enforcement personnel may be justified by its restoration of "community trust in the fairness of law enforcement" and facilitation of effective police service in encouraging citizen cooperation); Wygant, 476 U.S. at 286 (O'Connor, J., concurring) (opinion does not foreclose possibility that "other governmental interests which have been relied upon in the lower courts

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[24](...continued)
virtual exclusion of minority firms" from contracting opportunities." Fullilove, 448 U.S. at 485 (Burger, Ch.J.). See also Bakke, 438 U.S. at 365-66 (Brennan, J.). Hence, affirmative action has an equitable basis where there are continuing effects of prior discrimination regardless of whether the discrimination was private, governmental, or both.

but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies").

In the words of one noted commentator: "[T]he federal government alone cannot be expected to eradicate racial discrimination in America. Public institutions at all levels must contribute to the effort. They are often in a better position to . . . tailor corrective programs than is Congress. They should not be disqualified from this endeavor." Days, Fullilove, 96 Yale L.J. 453, 478 (1987).

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

Respectfully submitted,

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